

1993

# Allan Leslie McKay v. Mary Ann McKay : Reply Brief

Utah Court of Appeals

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Nolan J. Olsen; Attorney for Defendant/Appellee.

Robert H. Copier; Attorney for Plaintiff/Appellant.

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## Recommended Citation

Reply Brief, *McKay v. McKay*, No. 930060 (Utah Court of Appeals, 1993).

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UTAH COURT OF APPEALS

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DOCKET NO. 930060

IN THE UTAH COURT OF APPEALS

ALLAN LESLIE McKAY,

Plaintiff and  
Appellant,

vs.

MARY ANN McKAY,

Defendant and  
Appellee.

APPELLANT'S REPLY BRIEF

Appeal No. 930060-CA

(Argument Priority 15)

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY  
JUDGE STIRBA

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**FILED**  
Utah Court of Appeals

OCT 15 1993

*Mary Noonan*  
Mary T. Noonan  
Clerk of the Court

ALLAN LESLIE McKAY,	)	
	)	
Plaintiff and	)	APPELLANT'S REPLY BRIEF
Appellant,	)	
	)	
vs.	)	
	)	
MARY ANN McKAY,	)	Appeal No. 930060-CA
	)	
Defendant and	)	(Argument Priority 15)
Appellee.	)	
	)	
	)	

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### DETERMINATIVE LAW

#### RULES

U.R.C.P. 33(b)

(b) **Scope; use at trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or

contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

## **ARGUMENT**

### **POINT I.**

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ENTER SPECIFIC, DETAILED FINDINGS SUPPORTING ITS FINANCIAL DETERMINATIONS.

Appellee's Brief repeatedly refers to the "broad discretion" of the trial court in determining the financial interests of divorced parties. However, in this case that discretion was abused when the trial court entered inadequate findings supporting its financial determinations.

In the case of Hall v. Hall, 219 Utah Adv. Rep. 29 (Utah App. 1993), the court wrote:

This court accords the trial court considerable discretion in determining the financial interests of divorced parties. Allred v. Allred 797 P.2d 1108, 1111 (Utah App. 1990). Although "the court's 'actions are entitled to a presumption of validity,'" id. (quoting Hansen v. Hansen 736 P.2d 1055, 1056 (Utah App.) cert. denied, 756 P.2d 1217 (Utah 1987)), we cannot affirm its determination when the trial court abuses its

discretion. Allred, 797 P.2d at 1111. The trial court abuses its discretion when it fails to enter specific, detailed findings supporting its financial determinations. See id. Findings are adequate only if they are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusions on each factual issue was reached." Id. (quoting Stevens v. Stevens, 754 P.2d 952 958 (Utah App. 1988)). See also Sukin v. Sukin, 842 P.2d 922, 924 (Utah App. 1992) (detailed findings are necessary to determine whether trial court has exercised its discretion in a rational manner).

The trial court committed error by failing to make legally sufficient findings on all material issues.

## **POINT II.**

APPELLEE'S BRIEF IMPROPERLY ATTEMPTS TO PRESENT DOCUMENTS THAT ARE NOT A PART OF THE TRIAL RECORD.

Appellee's Brief relies on and includes copies of Plaintiff's answers to interrogatories signed by Mr. McKay on April 21, 1983, as well as copies of state and federal tax returns jointly filed by Mr. McKay and his current wife for the tax years 1981 and 1982.

These materials are not part of the trial record, which consists of the five (5) exhibits which were introduced at the modification hearing (all of which are attached to Appellant's

Opening Brief) and which also consists of the transcript of the hearing, including stipulations by counsel transcribed on Pages 3 - 8 of the transcript and witness testimony transcribed on Pages 8 - 46 of the transcript.

Due to the sparseness of the trial record, Appellee now attempts to introduce additional materials by attaching copies thereof to her brief. Said attempt is improper and should be disregarded. Even if the tax returns were at some point placed into the court file, they are not part of the record for purposes of the modification hearing because they were never introduced at the modification hearing.

Even if the answers to interrogatories were filed with the court and are included in the court file, they are not part of the trial record if they were not used at the modification hearing pursuant to the Utah Rules of Evidence.

U.R.C.P. 33(b) provides that answers to interrogatories "may be used to the extent permitted by the Rules of Evidence." The answers to interrogatories appended to Appellee's Brief were not used at trial, and are not part of the trial record.



### **POINT III**

APPELLANT'S OPENING BRIEF PROPERLY MARSHALS THE EVIDENCE AND PROPERLY CITES TO THE TRIAL RECORD.

Point I of Appellee's Brief argues that Appellant's Opening Brief did not provide this court with the relevant facts of this case with citations to the record. In a blatant misrepresentation to this court, Appellee makes the following false statement on Page 5 of Appellee's Brief:

In fact, Mr. McKay's Brief fails to provide this court with any citations to the record. (Appellee's Brief, Page 5).

This misrepresentation to the court is belied by the fact that Appellee's Brief contains numerous citations to the record. Appellee's Brief included the facts and citations in its argument portion. Appellee reasonably relied on the check list for briefs sent out by the Court or Appeals for this appeal. That check list, sent April 7, 1993, stated it contained rule changes effective October 1, 1992. Earlier versions of the check list included "relevant facts with citations to the record" as number 8 of the 12 content requirements. However, the check list sent out for this appeal omitted this requirement, went directly to "summary of the

argument" as item 8, and included only 11 required items instead of 12. Appellee's Brief fully complies with Rule 24 with the following citations:

Page 8 includes two (2) citations to the hearing transcript, including citations to transcript Page 9, Line 3 and transcript Page 9, Line 5.

On Page 9, Appellant's Opening Brief contains two (2) citations to Page 8 of the transcript.

Page 11 of Appellant's Opening Brief includes a citation to transcript Page 46, Line 11, transcript Page 46, Line 12, transcript Page 46, Line 13, and transcript Page 46, Line 17.

Page 12 of Appellant's Opening Brief includes a citation to transcript Page 32, Line 17, transcript Page 59, Line 15, as well as a citation to trial exhibit 4-P, which was appended to Appellant's Opening Brief together with all the other exhibits received into evidence.

Page 14 of Appellant's Opening Brief includes citations to transcript Page 34, Line 8, transcript Page 40, Line 17, and to Exhibit No. 5.

Page 15 of Appellant's Opening Brief includes a citation to transcript Page 50 and is followed by a bar chart summary of the information contained in the exhibits.

Page 18 of Appellant's Opening Brief includes a citation to transcript Page 5, Line 6.

Page 19 of Appellant's Opening Brief includes a citation to transcript Page 47, Line 25.

In making these citations to the record, Appellant's Opening Brief goes through all twenty three (23) findings of fact one at a time and marshals all of the evidence in an attack on the findings that are contested. The fact of the matter is that the record in this case is scanty and sparse when it comes to any evidence that supports the legally insufficient findings of fact in this case.

In addition to going through the findings of fact one at a time, and marshalling the evidence with citations to the

record, Appellant's Opening Brief also includes a statement of the case which sets forth the nature of the case, the course of proceedings, and the disposition at the trial court.

Pursuant to U.R.A.P. 11(a), the record on appeal includes papers and exhibits filed in the court from which the appeal is taken, the transcript of proceedings, the docket entries, and the index prepared by the clerk of the trial court. Appellant's Opening Brief repeatedly cites to this record, and Appellee's misrepresentation that "(i)n fact, Mr. McKay's Brief fails to provide this court with any citations to the record" is a blatantly false and outrageous misrepresentation in that Appellant's Opening Brief sets forth the nature of the case, the course of proceedings, the disposition at the trial court, and a detailed analysis of the individual findings of fact with numerous citations to the record. In the case of Steele v. Board of Review, 845 P.2d 960 (Utah App. 1993), this court granted a motion to strike a brief for the following reasons:

Steele's brief does not contain the requisite statement of facts. Moreover, Steele's cursory statement of the case does not contain any citations to the record. Likewise, in the argument portion of her brief, Steele fails to provide citations to any parts of the record relied upon therein.

Unlike Appellant's Opening Brief in this case, Steele failed to provide any citations to the record, either in the statement of facts, or in the argument portion of Steele's brief in that case.

Appellant's Opening Brief in this case contains numerous citations to the trial record and fully complies with the letter mailed from the Utah Court of Appeals to Appellant's counsel dated April 7, 1993, together with a "check list for briefs" provided to counsel therewith. Copies of the letter and the check list are included as addenda hereto. Paragraph 7 under content requirements requires that the statement of the case include:

- (a) Nature of the case;
- (b) Course of proceedings;
- (c) Disposition at trial court or agency,

There is no requirement in this version of the check list that a statement of facts or citations to the record be included within or immediately after the statement of the case. Indeed, facts and citations included in the argument portion of the brief as was done in Appellant's Opening Brief in this case comply with the Court of Appeals check list as well as with the U.R.A.P. 24(a)(7) provision that facts and citations

"shall follow" the statement of the case, since the argument portion appears farther into the brief than the statement of case. In Steele v. Board of Review, supra, the Court of Appeals stated that the problem was that citations to the record were included in neither a separate statement of facts nor in the argument portion of the Brief.

Finally, in addition to fully complying with the check list provide by the Utah Court of Appeals, Appellant's counsel followed his regular practice of having the clerical staff at the Utah Court of Appeals review and approve Appellant's Opening Brief for compliance with the Utah Rules of Appellate Procedure before having it printed.

Accordingly, having fully complied with the check list promulgated by the Utah Court of Appeals, having followed the language of U.R.A.P. 24(a)(7), having submitted Appellant's Opening Brief for compliance review by the clerk's office of the Utah Court of Appeals prior to having it printed, and having included in Appellant's Opening Brief a statement of the nature of the case, a statement of the course of proceedings, a statement of the disposition at the trial court, together with a finding by finding analysis and marshalling of the evidence as to each individual finding of fact, with references

to the transcript pages and hearing exhibits of record, Appellant has presented the facts to the Utah Court of Appeals in a manner that should be of help and assistance to the Court of Appeals in deciding the legal issues arising from those facts, and has reasonably relied on correspondence from the Court of Appeals purporting to set forth the current requirements for this appeal.

#### **POINT IV.**

THE RECORD AND FINDINGS OF FACT ARE LEGALLY INSUFFICIENT TO SUPPORT AN AWARD OF FIVE HUNDRED DOLLARS PER MONTH IN ALIMONY.

Point Two of Appellant's Brief attempts to demonstrate that there has been a relative change in the income of the parties since the entry of the prior alimony award. The record and findings of fact are legally insufficient in this regard.

In order to assess whether or not there has been a substantial change in income justifying a modification of a prior alimony award, the following four items are needed, at a minimum:

- (1) The husband's income at the time of the prior alimony award.
- (2) The husband's current income.
- (3) The wife's income at the time of the prior alimony award.
- (4) The wife's current income.

If any one of the four (4) items is missing, it is not possible to measure the relative change in income.

Neither the findings of facts nor the hearing record set forth Mrs. McKay's income at the time of the prior alimony award. The only indirect testimony not directly on point is that she was not working immediately after the original divorce. (T.9, Line 19). The stipulation as to Mrs. McKay's income was limited to a stipulation by Mr. McKay that he was not disputing that Mrs. McKay was disabled and also receiving social security benefits. (Appellee's Brief, Page 9) Mr. McKay did not stipulate that this constituted any change of circumstances, any change in income, or that Mrs. McKay's income now was any different than it was at the time of the prior alimony award. The fact that Mrs. McKay was disabled and also receiving social security benefits does not mean that her income is any different now than it was at the time of the



prior alimony award, and it could have gone up or down or stayed the same. The findings are simply silent on this crucial point.

Furthermore, there is no factual basis in the record to find that Mr. McKay's income at the time of the prior alimony award was TWENTY THOUSAND DOLLARS (\$20,000.00) per year. The interrogatory answers and tax returns appended to Appellee's Brief were not introduced or received into evidence at trial, where they would have been subject to the requirements of the Utah Rules of Evidence, including, but not limited to, Rules 106, 612, and 613 of the Utah Rules of Evidence. The fact that a set of interrogatory answers or tax returns have found their way into the court file or have been appended to a brief does not make them part of the hearing record upon which findings of fact can be based.

Without a finding as to what Mrs. McKay's income was at the time of the prior alimony award of ONE DOLLAR (\$1.00) per year, and without a sufficient basis in the record for finding as to Mr. McKay's prior income, there is no way to determine whether the current income of the parties in any way gives rise to a relative change of circumstances.

Furthermore, modification requires petitioner to show not only a change in circumstances, but requires petitioner to show that said change in circumstances was unforeseen at the time of the prior alimony award. As to the requirement of changed circumstances, the trial court improperly placed the burden of proof on Mr. McKay instead of on Mrs. McKay. (T.58, Line 23). Appellee's brief totally fails to address Mr. McKay's argument that eventual deteriorating and death is a part of life that is inherently foreseen in every decree of divorce, and therefore, the absence of any detailed factual basis for finding that such condition was unforeseen further renders the findings of fact and record legally insufficient.

Appellant's Opening Brief properly marshals all of the evidence, Appellee's Brief cites to nothing in addition thereto in the trial record that is directly applicable to this issue, and both the hearing record and the findings of fact are legally insufficient.

**POINT V.**

THE FINDINGS OF FACT ARE LEGALLY INSUFFICIENT TO SUPPORT AN ORDER MODIFYING DECREE OF DIVORCE REQUIRING PLAINTIFF TO PAY THE BALANCE DUE ON THE ORTHODONTIC OBLIGATION FOR THE MINOR CHILD, DONALD ALLEN MCKAY, AS WELL AS THE BALANCE DUE DR. WILSON.

Appellee's Brief fails to even respond to the utter absence of any findings concerning the medical bills that are sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on these financial determinations was reached. In fact, the findings do not even set forth the amount of the obligations, let alone the steps by which the court decided that these obligations should be imposed upon Mr. McKay.

Appellant's Opening Brief properly marshals all of the evidence, Appellee's Brief cites to nothing in addition thereto in the trial record that is directly applicable on this issue, and the findings of fact are legally insufficient.

Furthermore, the matter of the medical bills appears to have been improperly litigated pursuant to a Petition to Modify rather than by an Order to Show Cause.

**POINT VI.**

THE RECORD AND FINDINGS OF FACT ARE LEGALLY INSUFFICIENT TO SUPPORT AN AWARD OF ATTORNEY'S FEE AGAINST MCKAY IN THE SUM OF TWO THOUSAND SEVEN HUNDRED EIGHTY NINE DOLLARS, OR ANY OTHER AMOUNT.

Based upon the failure of Mrs. McKay to create and preserve a legally sufficient modification hearing record, together with her failure to prepare and present to the trial court findings of fact that are legally sufficient and which are sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue is reached, the award of attorney's fees in the trial court should be reversed.

**POINT VII.**

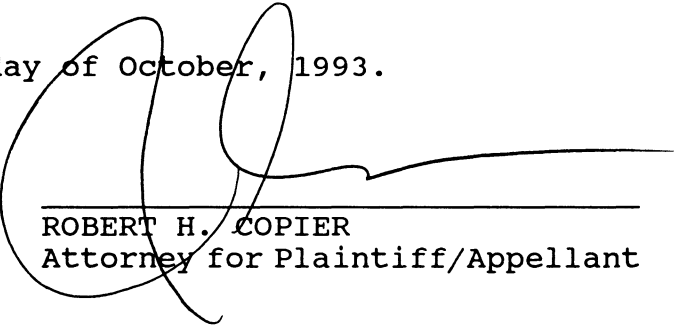
THE RECORD AND FINDINGS OF FACT ARE LEGALLY INSUFFICIENT TO SUPPORT AN AWARD OF ATTORNEY'S FEES ON APPEAL.

Based upon the state of the record below, the legal insufficiency of the findings of fact, and the legal argument presented by Mr. McKay on appeal, Mr. McKay should prevail on the major issues on this appeal. Therefore, attorney's fees on appeal should not be awarded to Mrs. McKay, pursuant to the reasoning in Hall v. Hall, 219 Utah Adv. Rep. 29 (Utah App. 1993), denying attorney's fees on appeal to the appellee in that case.

**CONCLUSION**

The Order of Modification should be reversed.

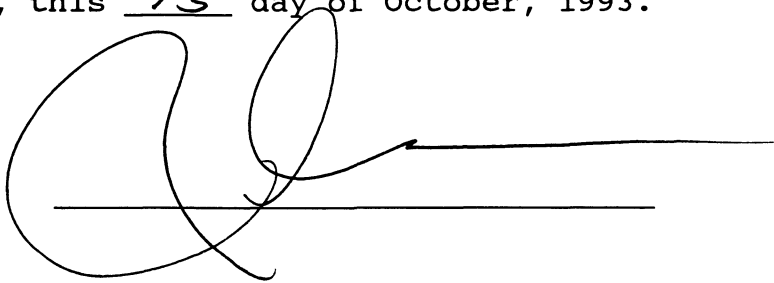
DATED this 15 day of October, 1993.



\_\_\_\_\_  
ROBERT H. COPIER  
Attorney for Plaintiff/Appellant

**CERTIFICATE OF SERVICE**

This is to certify that true and correct copies of the foregoing Appellant's Reply Brief were mailed by First Class Mail, postage prepaid, to Nolan J. Olsen, Esq., 8183 South State Street, Midvale, Utah, this 15 day of October, 1993.

A handwritten signature in black ink, consisting of a large, stylized 'O' followed by a series of loops and a long horizontal stroke extending to the right.

wp5\copier\mckayrp.brf

## **ADDENDA**

Judith M. Billings  
Presiding Judge

Leonard H. Russon  
Associate Presiding Judge

Russell W. Bench  
Judge

Reginal W. Garff  
Judge

Pamela T. Greenwood  
Judge

Norman H. Jackson  
Judge

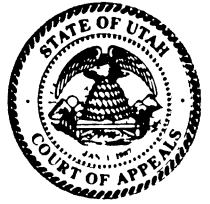
Gregory K. Orme  
Judge

# Utah Court of Appeals

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Mary T. Noonan  
Clerk of the Court

April 7, 1993

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In Re:

Allan Leslie McKay,  
Plaintiff and Appellant,

v.

Case No. 930060-CA

Mary Ann McKay,  
Defendant and Appellee.

Dear Messrs. Shields and Copier:

On April 7, 1993, the record index on this appeal was filed in this court. The record remains on file with the trial court for your use in preparing your brief. The purpose of this letter, therefore, is to set the briefing schedule.

Pursuant to Rules 13 and 26, Utah Rules of Appellate Procedure, the appellant's brief must be served and filed on or before May 20, 1993. This due date takes into consideration the three days mailing provision of Rule 22(d). Briefs filed by use of first class mail must be postmarked on or before May 20th, pursuant to Rule 21(a).

Please refer to the attached checklist and Rules 24, 26 and 27 for content and format requirements. These requirements are strictly enforced. Before making duplicate copies of your original brief, you may bring your original to the clerk's office at the Court of Appeals for examination. This will ensure that the brief is correct, and may save you time and expense.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janice Ray".

Janice Ray  
Deputy Clerk

cc: Nolan J. Olsen



**CHECKLIST FOR BRIEFS**  
**RULES 24, 26, & 27**

**Deadlines for Filing**

1. Appellant: 40 days from notice by clerk.
2. Appellee: 30 days after service of the appellant's brief
3. Reply: 30 days after service of the appellee's brief

**Proof of Service**

1. Upon counsel for all parties to the appeal.
2. In criminal appeals from District Court, upon the Attorney General.
3. In criminal appeals from Circuit Court, upon the city or county attorney.
4. Attorney's original signature required on proof of service (Rule 21(e)).

**Number of Copies**

1. Court of Appeals: Eight copies - one with original signature.
2. **Two copies** served on counsel for each party separately represented.

**Length**

1. Appellant and Appellee: 50 Pages, excluding addendum
2. Reply: 25 pages, excluding addendum.
3. Petitioner for Rehearing: 15 pages, excluding addendum.

**Size and Binding**

1. Size: 8 1/2" X 11".
2. Binding: Compact or Vello binding required: coiled plastic or spiral binding not acceptable.

**Printing Requirements**

1. Adequate margins
2. Ten characters per inch. Proportional spacing is acceptable.
3. Print on both sides of the page.
4. Double spaced: 1 1/2 line spacing is not acceptable.

**Cover Requirements**

1. Heavy weight paper.
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Appellant or Petitioner. . . . .	Blue
Appellee or Respondent . . . . .	Red
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Petition for Rehearing . . . . .	Tan
Response to Pet'n for Rehearing. . . . .	White
3. Caption of the Case:
  - a. full title of the case as it appeared in the trial court or agency;
  - b. designation of the parties as they appeared in the trial court or agency (e.g., "plaintiff/defendant");
  - c. designation of the parties as they appear in appellate court (e.g., "appellant/appellee")
4. Name of the appellate court ("In the Utah Court of Appeals")
5. Appellate court case number.
6. Title of the document (e.g., "Brief of the Appellant", "Brief of the Appellee").
7. Nature of the proceeding (e.g., "appeal", "petition for review").
8. Name of the trial court or agency and name of the judge (e.g., "Appeal for the Third District Court, Salt Lake County, Judge Smith").
9. Name of counsel and the parties they represent:
  - a. counsel filing brief on lower right;
  - b. opposing counsel on lower left.
10. Argument priority classification from Utah R. App. P. 29(b):

### **RULE 29(b)**

- (1) Appeals from convictions in which the death penalty has been imposed;
- (2) Appeals from convictions in all other criminal matters with priority to cases in which the defendant is incarcerated;
- (3) Appeals from habeas corpus petitions and other post-conviction proceedings;
- (4) Appeals from orders concerning child custody or termination of parental rights;
- (5) Matters relating to the discipline of attorneys
- (6) Matters relating to applicants who have failed to pass the bar examination;
- (7) Petitions for review of Industrial Commission orders;
- (8) Appeals from the orders of the Juvenile Court;
- (9) Appeals from actions involving public elections;
- (10) Appeals from interlocutory orders;
- (11) Questions certified to the Supreme Court by a court of the United States;
- (12) Original writ proceedings;
- (13) Petitions for certiorari that have been granted;
- (14) Petitions to review administrative agency orders not included within other categories; and
- (15) Any matter not included within the above categories.

### **Content Requirements - In the Order Stated - Per Rule 24**

1. List of all parties unless the caption on the cover shows all parties.
2. Table of contents with page references.
3. Table of authorities with page references: (a) cases listed alphabetically with parallel citations; (b) rules; (c) statutes; (d) other authorities.
4. Statement showing jurisdiction of the appellate court.
5. Statement of the issues. For each issue state the standard of review and supporting authority. (Optional with appellee if there is no disagreement with appellant's statement.)
6. Determinative constitutional provisions, statutes, ordinances, and rules set forth verbatim or by citation alone if they are set forth verbatim in the addendum.
7. Statement of the case (Optional with appellee if there is no disagreement with appellant's statement):
  - a. nature of the case;
  - b. course of proceedings;
  - c. disposition at trial court or agency,
8. Summary of the argument.
9. Detail of the argument.
10. Conclusion containing a statement of the relief sought.
11. Original signature of counsel of record or party appearing without counsel on one copy of brief; reproduced signature on other copies.

### **Addendum**

1. Attach at end of brief or file separately.
2. Not counted against total page number.
3. Contents:
  - a. Reproduction of opinion, memorandum decision, findings of fact, conclusions of law, orders, or jury instructions;
  - b. Reproduction of parts of the record of central importance such as contracts or other documents;
  - c. Reproduction of determinative constitutional provisions, statutes, or rules.

**\*\*\* AS OF RULE CHANGE OF OCT. 1, 1992, THE CONTENT OF THE REPLY BRIEF SHALL CONFORM TO THE REQUIREMENTS OF PARAGRAPH (2), (3), (6), (9), and (10) OF RULE 24.**